

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT JEROME and KAREN
JEROME, husband and wife,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

NO: 2:14-CV-406-RMP

ORDER DENYING UNITED
STATES' MOTION TO DISMISS FOR
LACK OF JURISDICTION

BEFORE THE COURT is the United States' Motion to Dismiss for Lack of Jurisdiction, ECF No. 16, and Defendant Randall Gillingham's Motion for Extension of Time to File, ECF No. 23. Plaintiff and Co-Defendant, Randall Gillingham, d/b/a Castle Construction and Materials (Castle), both filed responses in opposition to the motion. ECF Nos. 21 and 27, respectively. The Government replied to both responses at ECF Nos. 22 and 32. The Court has reviewed the pleadings and is fully informed.

ORDER DENYING UNITED STATES' MOTION TO DISMISS FOR LACK OF JURISDICTION ~ 1

BACKGROUND

On December 19, 2012, Robert Jerome (“Plaintiff”) slipped and fell on ice while at his job transporting mail for the United States Postal Service (“USPS”) at the Spokane Processing and Distribution Center located at 2928 South Spotted Road, Spokane, Washington. *See* ECF No. 15 at 3. The fall occurred around 10:00 p.m. outside the driver door of Plaintiff’s truck that was parked by the ramp at Door 14. ECF No. 21-2 at 2. The United States owns and possesses those premises. ECF No. 15 at 2.

USPS entered into a contract with Castle Construction (“Castle”) to provide snow plowing services for a specified portion of the USPS property in 2012/2013. ECF No. 16-1 at 1; ECF No. 16-2. USPS retained the responsibility to shovel and de-ice the area immediately adjacent to the building entrances and the sidewalks, ECF No. 16-1 at 2, but Castle was responsible for snow removal in the area where Plaintiff fell pursuant to the contract. ECF No. 16-1 at 2.

The contract stipulated that Castle was responsible for snow removal and “all damage to persons... that occurs as a result of its omission(s) or negligence,” taking “proper safety and health precautions to protect the work, the workers, the public, the environment, and the property of others” in the specified area covered by the contract. ECF No. 16-2 at 6. However, these broad duties could be triggered in only one of two ways:

1 If the accumulation of snow exceeds two (2) inches, the supplier shall
2 commence the snow removal operation without further notification, in
3 accordance with the priorities and schedule specified herein.
4 Exceptions: As and if directed, the Supplier [Castle] shall provide “on-
call” services when weather conditions arise that may endanger the
safety of Postal employees or customers. Upon notification by the
Postal Service, the successful Supplier shall respond within one hour.

5 ECF No. 22-2 at 6. Castle also was to “provide salting on an ‘only as requested’
6 basis.” *Id.*

7 On December 19, 2012, the day of Plaintiff’s fall, there was less than two
8 inches of snowfall on the ground.¹ ECF No. 21-1. Although a USPS maintenance
9 employee shoveled a path by Door 14, an area not covered by Castle’s contract,
10 and treated it with de-icer around 6:45 p.m., *see* ECF No. 29 at 8, USPS did not
11 call Castle to remove snow or apply salt or de-icer to the area covered by the
12 contract on the day of the accident, *see* ECF No. 28 at 2. Therefore, the areas for
13 which Castle would have been responsible if there were more than two inches of
14

15 ¹ The record contains declarations, reports, and weather data to support the
16 assertion that less than two inches of snow was on the ground, *see e.g.*, ECF No.
17 21-1 at 4, and USPS only provides a declaration that there was “about two inches
18 of snow accumulating. . .” *See* ECF No. 16-3 at 2. This may be disputed later, but
19 for purposes of assessing jurisdiction, the Court relies on the submitted evidence,
20 which shows less than two inches of snow accumulation on that day.

1 snow, or if they had been called by USPS, were left un-shoveled and without salt
2 or de-icer.

3 Plaintiff supports this Court's jurisdiction over this case by citing to the
4 Federal Torts Claim Act ("FTCA"), 28 U.S.C. § 1346(b)(1), as a waiver of USPS's
5 sovereign immunity. Defendant USPS contends that it delegated all of its safety
6 responsibilities regarding snow removal to Castle, who worked for USPS as an
7 independent contractor, and, therefore, USPS has not waived sovereign immunity
8 pursuant to the FTCA. *See* ECF No. 16. Plaintiff alleges that USPS retained
9 certain safety responsibilities despite its snow removal contract with Castle and
10 that because USPS did not delegate all of the snow removal duty and failed to
11 perform its own responsibilities, the FTCA applies. *See* ECF No. 21 at 2.

12 ANALYSIS

13 "[S]overeign immunity shields the Federal Government and its agencies
14 from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (citing *Loeffler v. Frank*,
15 486 U.S. 549, 554 (1988)). The federal government cannot be sued unless it has
16 "unequivocally expressed" a waiver or consent to be sued. *Dunn & Black, P.S. v.*
17 *United States*, 492 F.3d 1084, 1088 (9th Cir. 2007). A waiver must be strictly
18 construed in favor of the sovereign and cannot be implied. *Id.* Subject matter
19 jurisdiction depends on this prerequisite. *Munns v. Kerry*, 782 F.3d 402, 412 (9th
20 Cir. 2015) (citing *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1117 (9th Cir.

1 2003)). “Once challenged, the party asserting subject matter jurisdiction has the
2 burden of proving its existence.” *Robinson v. United States*, 586 F.3d 683, 685
3 (9th Cir. 2009) (citing *Rattlesnake Coal. v. E.P.A.*, 509 F.3d 1095, 1102 n.2 (9th
4 Cir. 2007)).

5 A challenge to jurisdiction under FED. R. CIV. P. 12(b)(1) can be facial,
6 which confines the court’s inquiry to allegations in the complaint, or factual, which
7 allows the court to consider extrinsic evidence. *Savage v. Glendale Union High*
8 *Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003). If a
9 factual attack is raised, the opposing party must provide “competent proof,” *Leite*
10 *v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Hertz Corp. v. Friend*,
11 559 U.S. 77, 96-97 (2010)), such as “affidavits or other evidence necessary to
12 satisfy its burden of establishing subject matter jurisdiction.” *Savage*, 343 F.3d at
13 1040 n.2 (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)). The
14 nonmoving party must prove “by a preponderance of the evidence that each of the
15 requirements for subject-matter jurisdiction has been met.” *Leite*, 749 F.3d at 1121
16 (citing *Harris v. Rand*, 682 F.3d 846, 851 (9th Cir. 2012)). “The court need not
17 presume the truthfulness of the plaintiff’s allegations.” *Safe Air for Everyone v.*

1 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214,
2 1242 (9th Cir. 2000)).

3 The Federal Tort Claims Act (FTCA) is a waiver of sovereign immunity for
4 certain torts committed by federal employees. *F.D.I.C.*, 510 U.S. at 475; 28 U.S.C.
5 § 1346(b)(1). The FTCA provides U.S. district courts with

6 exclusive jurisdiction of civil actions on claims against the United
7 States, for money damages... [for] personal injury or death caused by
8 the negligent or wrongful act or omission of any employee of the
9 Government while acting within the scope of his office or employment,
under circumstances where the United States, if a private person, would
be liable to the claimant in accordance with the law of the place where
the act or omission occurred.

10 28 U.S.C. § 1346(b)(1). However, the FTCA expressly excludes “any contractor
11 with the United States” as an employee. 28 U.S.C. § 2671. Whether a person
12 qualifies as a contractor is a question of law. *Logue v. United States*, 412 U.S. 521,
13 528 (1973). “[T]he critical test for distinguishing an agent from a contractor is the
14 existence of federal authority to control and supervise the ‘detailed physical
15 performance’ and ‘day to day operations’ of the contract.” *Autrey v. United States*,
16 424 F.3d 944, 956 (9th Cir. 2005) (citing *Hines v. United States*, 60 F.3d 1442,
17 1446 (9th Cir. 1995)).

18 It is undisputed that USPS contracted with Castle to remove snow from the
19 Spokane Packing and Distribution Center, but at issue for purposes of subject
20 matter jurisdiction is when that duty arose and what duties USPS retained.

1 Plaintiff primarily relies on *Haskin v. United States*, 569 F.App'x 12 (2d. Cir.
2 2014), to illustrate that jurisdiction may be conferred through the FTCA when
3 certain responsibilities are retained in a contract and not performed. *See* ECF No.
4 21 at 7-9.

5 In *Haskin*, USPS had a contractual obligation to either call its contractor to
6 remove accumulated snow when it was less than two inches or remove it
7 themselves. 569 F.App'x at 15. The court in *Haskin* found USPS had delegated
8 some of its snow removal responsibilities and had retained a duty to inspect the
9 sidewalks when less than two inches of snow fell because USPS employees
10 customarily checked the sidewalks and removed accumulated snow and ice. *Id.*
11 Similarly, Plaintiff here argues that USPS was still responsible for overseeing
12 Castle's work and controlling snow removal on sidewalks, steps, ramps, and the
13 area where Plaintiff fell if less than two inches of snow were on the ground and if
14 USPS had not called Castle to provide services under those circumstances. *See*
15 ECF No. 21.

16 If there was less than two inches of snow on the ground, Castle's contractual
17 duties could only be triggered by a call from USPS. *See* ECF No. 22-2 at 6.
18 Pursuant to the terms of the contract, absent a call from USPS, the responsibility
19 for maintaining the premises when there were less than two inches of snow on the
20 ground could only be attributed to the landowner, USPS. Although the broad

1 language of the contract indemnified USPS from “all damage to persons” that
2 resulted from Castle’s “omission(s) or negligence,” ECF No. 16-2 at 6, the
3 statement of work narrowed that duty to only be applicable when either more than
4 two inches of snow was on the ground or when USPS called Castle to provide
5 “‘on-call’ services.” ECF No. 22-2 at 6. Since the evidence supports the
6 conclusion that there was less than two inches of snow on the ground on the night
7 that Plaintiff fell, *see* ECF No. 21-1 at 4, and USPS had not called Castle, USPS
8 was responsible for maintaining the safety of its premises. Therefore, the Court
9 finds that the exception to the FTCA for independent contractors does not apply
10 and USPS has waived its sovereign immunity.

11 Defendant USPS proffers other arguments related to a defense of liability
12 regarding its own duty of care. *See* ECF No. 22. Although those arguments would
13 properly support a motion for summary judgment regarding liability, that is not the
14 current issue. Rather, the limited question of subject matter jurisdiction is all that
15 is before the court in the present motion. The relevant inquiry for purposes of
16 subject matter jurisdiction under the FTCA is whether USPS delegated to
17 Defendant Castle all of its duties for maintaining the safety of the premises in the
18 area specified in the contract. The Court finds that USPS did not delegate all
19 duties, but only duties related to when more than two inches of snow accumulated
20

1 in the area specified in the contract or if USPS had called Castle to work on that
2 area, neither of which occurred in this case.

3 Absent those conditions that are prerequisites for finding a duty imposed on
4 Castle, Defendant USPS retained the duty for maintaining safe premises similar to
5 any other landowner. Therefore, the Federal Tort Claims Act properly confers
6 subject matter jurisdiction over this case in light of the facts presently before the
7 Court.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. United States' Motion to Dismiss for Lack of Jurisdiction, **ECF No. 16**,
10 is **DENIED**.

11 2. Defendant Gillingham's Motion for Extension of Time, **ECF No. 23**, is
12 hereby found as **MOOT**.

13 The District Court Clerk is directed to enter this Order and provide copies to
14 counsel.

15 **DATED** this 2nd day of March 2016.

16
17 *s/ Rosanna Malouf Peterson*
18 ROSANNA MALOUF PETERSON
19 United States District Judge
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